Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ROY W. BENJAMIN,

Petitioner,

v.

KATTEN, MUCHIN & ZAVIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDICES

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49 pp

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 25, 2001
Decided May 11, 2001

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 00-1370

ROY W. BENJAMIN,
Plaintiff-Appellant,

v.

KATTEN MUCHIN & ZAVIS,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Div.

No. 95 C 5077

Wayne R. Andersen, *Judge.*

ORDER

Roy Benjamin, an African American and a former employee of Katten Muchin and Zavis (KMZ), initiated this pro se lawsuit in 1995, alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; the Fair Labor Standards Act of 1939, 29 U.S.C. 201 *et seq.*; and the Civil Rights Act of 1866, 42 U.S.C. 1981. KMZ denied his allegations, claiming he was terminated for

poor performance. The district court entered summary judgment in favor of KMZ, and Benjamin appeals pro se. We affirm.

III. Background

Benjamin's relationship with KMZ began in mid-1990 when he worked as a paralegal through a temporary placement agency. While there Benjamin met Edward Shealy, the manager of the docketing department, who expressed interest in hiring Benjamin permanently when a position became available. Based on Shealy's recommendation KMZ hired Benjamin as a full-time docket clerk in the docketing department in October 1990, although Benjamin contends he was hired as a paralegal for that department.

During Benjamin's tenure at KMZ, the docketing department employed three other individuals, all of whom reported to Shealy. Karen Martin, an African American, began working in the docketing department in 1986, and Charles Koven, a Caucasian, started in 1987. Additionally, Calvin Holmes, an African American, worked part-time in the evenings. According to KMZ, Koven and Martin received higher salaries than Benjamin because they had more experience at the firm.

By January 1991 all employees in the docketing department except Benjamin had received their performance review and a salary increase. Benjamin spoke to Shealy about this, who in turn contacted the director of personnel. Shealy learned that Benjamin

had been inadvertently omitted from the list of employees up for review at the time of year, and in March, Benjamin received his raise retroactive to January 1. Benjamin was dissatisfied with the amount of his raise despite KMZ's contention that Benjamin received a larger percentage increase than the other employees and requested a meeting with the director of personnel. Benjamin discussed his dissatisfaction with his raise, but did not assert that KMZ was discriminating against him on the basis of his race or gender.

The record contains much documentation of KMZ's concerns with Benjamin's performance. In January 1991 Shealy met with Benjamin to discuss the length of time it was taking Benjamin to complete certain tasks. In a memo to Benjamin's personnel file, Shealy noted his impression that Benjamin was "milking" overtime hours by taking an "inordinately long period of time" to accomplish his assignments. The following month, Martin, who was responsible for monitoring Benjamin's work, expressed concern to Shealy about Benjamin's attitude. According to Martin, Benjamin felt that some attorneys and secretaries were "wasting his time" by asking him to do certain tasks, and he indicated as much by sending them "strong notes." Additionally, Martin reported that Benjamin refused to follow department procedures in filling out time entries and the daily calendar.

By March 1991 Benjamin had withdrawn from the department's petty cash fund $500 that was not attributed to any client. Shealy told Benjamin he could be fired if he did not reimburse the fund within a week. Later that month Martin again spoke with

Shealy about Benjamin's performance. She noted that he was stubborn about returning file-stamped copies of documents to attorneys and that he refused to take her suggestions for avoiding overtime work.

In May, Shealy sent Benjamin a memo outlining his noncompliance with several docketing department procedures and identifying areas of improvement "mandatory for your continued employment." In the memo Shealy also limited Benjamin's overtime work and instructed him to refine his attitude toward staff members and others in the firm. Benjamin responded with a memo to Shealy claiming he was unaware of some departmental procedures Shealy mentioned but was certainly following those of which he knew. Benjamin further suggested that it was not his performance that was disturbing the department, but rather, "the ability of lack thereof, of my fellow staff members to get to know me or understand me, because they are intimidated by my personality, assertiveness, and confident air about myself or my demeanor."

Benjamin's performance problems continued despite the warning from Shealy. In July Shealy reprimanded Benjamin about his constant tardiness and instructed him not be late for a 30-day period or he would be fired. Shealy further ordered Benjamin to reduce his number of overtime hours by not working through the lunch hour.

Two months later, Martin and Koven requested a meeting with Shealy to discuss Benjamin's performance. In his memo to Benjamin's

file documenting the meeting, Shealy list 16 specific concerns including tardiness, poor attitude, substandard work, and failure to follow department policies. Based on Shealy's recommendation, KMZ terminated Benjamin on September 25, 1991. When Benjamin asked if he could transfer to a paralegal position, KMZ informed him that he was terminated with a "no rehire" status. During Benjamin's exit interview, the personnel director read him the memo from Shealy detailing the reasons for his discharge; Benjamin replied that it was "nothing but lies and fabrication."

Following his termination Benjamin applied for unemployment compensation. KMZ opposed his claim, contending that he committed misconduct in connection with his work. Ultimately, the review board found in favor of Benjamin. Additionally, according to Benjamin, KMZ provided negative references to two potential employers after his termination.

Benjamin filed a charge of race and gender discrimination with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission. After receiving a right-to-sue letter from the EEOC dated May 25, 1995, he initiated this lawsuit in September 1995, alleging in his final amended complaint Title VII violations involving race and gender discrimination in hiring and compensation, wrongful discharge based on race and gender, retaliatory discharge, and post-termination retaliation. In addition Benjamin alleged gender-based wage discrimination in violation of the FLSA and race and gender discrimination in violation of §1981. Following a lengthy discovery period, KMZ

moved for summary judgment, asserting that all of Benjamin's claim's were either untimely, noncognizable, or meritless. The district court agreed, entered summary judgment in favor of KMZ, and denied Benjamin's subsequent motion to reconsider. Benjamin appeals, challenging the summary judgment grant and the limit on his discovery imposed by the district court.

II. Analysis

A. *Title VII Claims*

Benjamin first complained that because of his race and gender KMZ hired him into a low-paying position in the docketing department not commensurate with his background and experience as a paralegal. The district court, analyzing this allegation under the indirect burden-shifting method of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1273), determined that Benjamin had not made out a prima facie case because he lacked proof that KMZ had a paralegal vacancy that remained open after he was rejected as a paralegal and hired instead into the docketing department. *See Vitug v. Multistate Tax Comm'n*, 88F.3d 506, 515 (7th Cir. 1996).

Benjamin argues here that he presented *direct* evidence of discrimination, and so the district court was wrong to apply *McDonnell Douglas*. Benjamin asserts that KMZ's admission that he satisfied the first three prongs of his prima facie case constitute direct evidence that should have allowed him to survive summary judgment. Direct evidence, however, is "evidence which if believed ... will prove the

particular fact in question without reliance on inference or presumption.: *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001) (internal quotation marks and citation omitted). An admission that Benjamin belonged to a protected class, met the qualifications of a paralegal position, and yet was not offered the position does not prove without inference that KMZ discriminated based on his race or gender. As such the district court correctly employed the McDonnell Douglas framework. Benjamin fails to address the district court's conclusion that the absence of an open paralegal position at KMZ was undisputed, and so summary judgment on his claim was proper.

Benjamin furthered alleged in his complaint with respect to hiring that KMZ employed a pattern or practice of concentrating African American males in lower-paying departments within the firm (e.g. the docketing department, mail room, and copy center). A pattern-or-practice claim is typically raised in a class action to show that an employer had a wide-ranging policy to discriminate against class members. *See Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990) (pattern-or-practice theory of discrimination is generally employed in class actions; citing cases). Individual plaintiffs do sometimes use pattern-or-practice evidence to bolster their own disparate treatment claims as evidence of pretext. *See Bell v. Envtl. Prot. Agency*, 232 F.3d 546,552-53 (7th Cir. 2000); *King v. Gen. Elec. Co.*,960 F.2d 617, 624-25 (7th Cir. 1992). But Benjamin failed even to establish a prima facie case of discrimination, so evidence of a pattern or practice to prove pretext would appear irrelevant.

Still, the district court apparently view

Benjamin's pattern-or-practice discussion as a separate theory. Benjamin failed, however, to marshal evidence of a pattern or practice of discrimination at KMZ. To demonstrate a pattern or practice of discrimination, a plaintiff must show by a preponderance of the evidence that race or gender discrimination was the company's "standard operating procedure-the regular rather than the unusual practice." *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 422 (7th Cir. 2000) (internal quotation marks and citation omitted). In order to establish a pattern or practice, a plaintiff must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Reviewing the evidence before it, the district court concluded that Benjamin offered *no* proof-statistical or anecdotal-of a policy or practice of discrimination by KMZ.

Benjamin points to statistics he offered in response to KMZ's motion for summary judgment that, of the 22 African American males employed by KMZ, 20 worked in the lowest compensated positions, such as the docketing department, mail room, and copy center. According to Benjamin, this statistic is proof that KMZ deviated from its affirmative action plan and engaged in a pattern or practice of discrimination. This statistical data comes from only a two-week period in December 1991, and the conclusions Benjamin draws are unsupported. Benjamin failed to establish for example, that any of the 20 African American males was over-qualified for the position held or

had ever applied for a different position within the firm. Benjamin also asserted during his deposition that one employee with an accounting degree worked in the copy center for three or four years before being assigned to an accounting position. But he offered no admissible evidence to verify his allegations.

In addition to his hiring discrimination claim, Benjamin alleged in his complaint that KMZ also based its decision to fire him on his race and gender. The district court concluded, given the exhibits KMZ introduced regarding concerns about Benjamin's performance, that he failed to establish that he was meeting the legitimate expectations of KMZ. *See Stockett v. Muncie Ind. Transit Sys.*, 221 F.3d 997, 1001 (7th Cir. 2000). The district court further noted that Benjamin could not prove that KMZ's legitimate reason for terminating him—his poor performance—was pretextual.

Here again Benjamin maintains that he offered evidence that the district court erroneously failed to categorize as "direct." He argues that his time sheets and monthly progress and billing reports were direct evidence of satisfactory performance. And he suggests that Koven's salary history and performance and attendance records were direct evidence that similarly-situated employees were treated more favorably. These documents, however, fail to establish discrimination without inference, and so the district court correctly analyzed them as indirect evidence under *McDonnell Douglas*.

As to the prima facie case for discriminatory termination, Benjamin asserts that he was meeting KMZ's legitimate expectations because KMZ offered

no evidence to support the complaints of his tardiness, failure to complete tasks, refusal to follow department procedures, and unauthorized overtime. The record, however, includes many memos from Benjamin's personnel file documenting the concerns of Shealy and others in the department regarding Benjamin's work. KMZ also introduced deposition testimony from Martin and Shealy identifying problems with Benjamin's work.

Benjamin also challenges the district court's pretext determination in a manner KMZ characterizes as a "shotgun argument." For example, Benjamin argues that the district court should have looked at the totality of the circumstances in evaluating the legitimacy of KMZ's proffered reason for his termination. Benjamin contends that Shealy's repeated threats of termination and KMZ's failure to investigate the complaints about his performance suggest pretext. These assertions are frivolous given the record of memos written to document complaints and Shealy's conversations with Benjamin regarding his performance. Benjamin also argues that Martin and Koven billed as much overtime as he did, and he infers pretext from this fact because Martin and Koven were not terminated. He offered no evidence, however, that the other employees were specifically instructed to reduce overtime hours as was he. Benjamin further asserts that KMZ's decision to write memos about his performance for his personnel file without his knowledge raised questions about the motives behind the memos. Absent more, these facts do not prove the KMZ was being deceitful or that it did not believe that Benjamin was performing poorly. *See Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1012

(7th Cir. 2000) (noting that pretext means that the employer did not honestly believe

the reasons it offered for the discharge); *Kulumani v. Blue Cross Blue Shield Ass'n*, 224 F.3d 681, 684 (7th Cir. 2000) defining pretext to mean "deceit used to cover ones' tracks").

Benjamin next claimed in his lawsuit that KMZ terminated him in retaliation for "exercising his rights to challenge . . . unfair employment practices." The district court acknowledged that Benjamin complained to the personnel director about his raise, but the court found that Benjamin was not engaged in a statutorily protected activity as required to make out a prima facie case. *See Aviles v. Cornell Forge Co.*, 241 F.3d 589, 592 (7th Cir. 2001) (prima facie case). Benjamin admitted in his deposition that he did not assert that the low raise was due to race or gender discrimination. Further, the district court determined that Benjamin had failed to establish any causal connection between his expression and his termination.

On appeal Benjamin fails to address the district court's determination that he offered no proof that he engaged in any activity protected by Title VII. Rather, Benjamin addresses the casual link, pointing out that the first negative performance report he received occurred only three weeks following his meeting with the personnel director to discuss his raise. As the district court correctly concluded, however, Benjamin's retaliation claim fails because he cannot

prove that he engaged in statutorily protected activity.

Finally, Benjamin alleged in his complaint that KMZ violated Title VII by engaging in retaliatory acts after his termination. According to Benjamin, KMZ provided negative references to potential employers and wrongfully opposed his unemployment compensation claim. Post-termination retaliation is cognizable under Title VII and follows the same *McDonnell Douglas* framework for analysis. *Ruedlinger v. Jarrett*, 106 F.3d 212, 214 (7th Cir. 1997); *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 888 (7th Cir. 1996). The district court concluded that Benjamin could not raise the claim based on KMZ's opposition to his unemployment compensation application because he failed to address that allegation in his administrative charge. The district court noted that a claim based on negative references to potential employers was not barred because Benjamin filed the administrative charge prior to the negative references. The district court concluded, however, that Benjamin failed to produce any evidence that KMZ actually gave negative references to potential employers.

The district court's exhaustion analysis was not entirely accurate, and KMZ's argument that Benjamin's post-termination retaliation claims were barred was correct . A Title VII plaintiff may raise only claims that were addressed with the EEOC or claims that are "like or reasonably related to" allegations in the EEOC charge. *Cheek v. Peabody Coal Co.*, 97 F3d 200, 202 (7th Cir. 1996). We have made an exception, however, for retaliation claims to avoid multiple EEOC filings in cases where the filing of an EEOC charge is the catalyst for retaliation. *Heuer v.*

Weil-McLain, 203 F.3d 1021, 1023 (7th Cir. 2000); *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 482-83 (7th Cir. 1996). Benjamin, however, did not claim that KMZ gave negative references to employers because of his EEOC charge. Nor did he argue that this claim was reasonably related to any claim listed in his EEOC filing. Accordingly, it would have been appropriate for the district court to conclude that all of Benjamin's post-termination retaliation claims were barred because of his failure to exhaust.

On the merits, Benjamin reiterates that KMZ needlessly opposed his unemployment claim and terminated him with a "no rehire" status. He does not, however, respond to the district court's conclusion that this claim is barred because he failed to present it to the EEOC. He also fails to point to any evidence he produced regarding negative references to other employers. Additionally, as with the retaliation claim, Benjamin has not identified any statutorily projected activity for which he suffered post-termination retaliation. The entry of summary judgment was, therefore, proper.

B. FLSA Claim

Benjamin argued before the district court that KMZ discriminated on the basis of gender in compensation its employees. According to Benjamin, similarly situated female employees performing equal work with equal effort received at least $6,000 more than Benjamin did. The Equal Pay Act, an amendment to FLSA, requires that differences in pay between members of opposite gender for equal work

must be based on factors other than gender. *Fyfe v. City of Fort Wayne*, 241 F.3d 597, 600 (7th Cir 2001). The district court concluded that Benjamin failed to satisfy the prima facie case because the other employees Benjamin discussed shouldered more responsibility than he did and so were not performing equal work. *See id.* Further, the district court noted that KMZ offered a "factor other than sex" that effected the pay differential – experience at KMZ and familiarity with its policies.

Benjamin argues that he and Koven and Martin all shared the same tasks and were expected to answer telephone inquiries from attorneys and secretaries, input data into the docked system, file and retrieve pleadings from various courts, edit the law bulletin, and fill out their time sheets. Because the FLSA prohibits wage discrimination only if based on gender, *Snider v. Belvidere Township*, 216 F.3d 616, 619 (7th Cir. 2000), Martin is the only relevant employee for comparison. An Benjamin fails to refute evidence KMZ offered that Martin bore other responsibilities in the department, including managing the docketing department in Shealy's absence and training and monitoring Benjamin. Benjamin further contends that he was more qualified than Martin because of his prior paralegal experience and that he was held to the same standards as the others, but he was still paid less. Whether two employees perform equal work, however, is a function of whether the jobs involve a "common core tasks" or whether "a significant portion of the two jobs is identical," rather than the individual qualifications of the employees. *See Howard v. Lear Corp. Eeds & Interiors*, 234 F.3d 1002, 1005 (7th Cir. 2000) (internal quotation marks and citation omitted).

Benjamin also attempts to argue that KMZ favors Caucasians in deciding compensation, but a race-based claim is not cognizable under the FLSA. *Snider*, 216 F.3d at 619.

D. Section 1981 Claim

In his complaint, Benjamin alleged "negligence for failure to provide an equal opportunity and reckless indifference to federally protected rights." According to Benjamin, KMZ's actions with respect to his hiring, compensation, and termination violated § 1981. A claim under § 1981 includes the same elements and employs the same analysis and methods of proof as a Title VII claim. *Johnson v. City of Fort Wayne*, 91 F.3d 922, 940 (7th Cir. 1996). Section 1981 claims, however,

must be filed within two years of the alleged violation. *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 807 (7th Cir. 1999).

Benjamin left KMZ on September 25, 1991, and he first raised this claim in his second amended complaint filed in February 1998. The district court determined that Benjamin's claim was untimely because the actions about which he complained occurred more than two years prior to his complaint. The district court declined to decide whether this claim related back to his original complaint filled September 5, 1995, because even his first complaint was filed almost four years after his termination. In opposition to the motion for summary judgment, Benjamin argued that the continuing violation theory

applied and rendered his complaint timely. The district court rejected this argument because Benjamin failed to allege any acts of discrimination with the limitations period.[1]

The continuing violation theory applies only if specific acts of discrimination occurred within the limitations period. *Freeman v. Madison metro. Sch. Dist.*, 231 F.3d 374, 381 (7th Cir. 2000); *Jones v. Merchants Nat'l Bank & Trust Co. of Indianapolis*, 42 F.3d 1054, 1058 n.4 (7th Cir. 1994). Here, the most recent act of discrimination that Benjamin's complaint challenged under § 1981 was his termination on September 25, 1991. In his reply brief, he specified that the last act of discrimination occurred in June 1993 when KMZ provided negative references to a potential employer. He, therefore, identifies no act in violation of § 1981 that occurred within two years of his original complaint (assuming arguendo that the relation back doctrine applies). Consequently, he cannot invoke the continuing violation theory, and his § 1981 claim is untimely. In any event, Benjamin faces an even more fundamental problem because the failure of Benjamin's Title VII claims forecloses his § 1981 claim. *See Johnson*, 91 F.3d at 940.

D. Discovery Order

In late 1996, Benjamin filed a motion to compel discovery, arguing that KMZ had not fully responded to his requests. Benjamin's discovery requests sought personnel records for all employees of the firm (including the lawyers) for a ten-year period 91985-1995), despite the fact that he worked there for only one year. At the very least he wanted to include all of

department was relevant to Benjamin's claims because Shealy, who initiated the termination process for Benjamin, had no control over any other departments. The magistrate judge to whom the discovery issue was assigned limited the discovery to records concerning only the members of the docketing department from 1989-1991.

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[1] The district court *received* Benjamin's first complaining on September 5, 1995, but according to the court the complaint was not *filed* until September 25, 1995. Consequently, in analyzing Benjamin's § 1981 claim, the district court calculated the two-year period during which acts of discrimination must have occurred as running from September 25, 1993 to September 25, 1995, rather than September 5, 1993 to September 5, 1995. For purposes here, the September 5 date controls, *see Jones v. Bertrand*, 171 F.3d 499, 503 (7th Cir. 1999), but the court's mistake has no bearing on the outcome.

Benjamin then filed a motion asking the district court to modify the magistrate judge's order, but the district court declined. On appeal, Benjamin argues that the district court abused its discretion in limiting his discovery requests. He suggests that KMZ misrepresented to the district court that he was hired as a docketing clerk and not a paralegal, and the district court therefore based its discovery ruling on a clearly erroneous fact.

A district court has wide latitude in structuring discovery, and we will review its decisions only for an abuse of discretion. *Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999). In the absence of "actual and substantial prejudice to the complaining litigant," the

district court's decision will stand. *Searls v. Glasser*, 64 F.3d 1061, 1068 (1995). Further, if a party fails to comply with Rule 56(f), we will generally not find an abuse of discretion. *Woods v. City of Chicago*, 234 F.3d 979, 990 (7th Cir. 2000). In this case, given that Benjamin did not file an affidavit pursuant to Rule (f) or request more time for discovery, the district court did not abuse its discretion in limiting discovery and ruling on the summary judgment motion.

IV. Conclusion

Accordingly, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROY W. BENJAMIN, Plaintiff,	)	
	)	Case No. 95 C 5077
v.	)	
	)	Judge Wayne R. Andersen
KATTEN, MUCHIN & ZAVIS, Defendant.	)	

(Reserved for use by the Court)

ORDER

This matter is before the Court on the Motion to Reconsider pursuant to Rule 59(e) of the Federal Rules of Civil Procedure brought by Plaintiff Roy W. Benjamin. We grant in part Benjamin's motion and amend the reference on page seven line 12 of our Memorandum Order and Opinion of December 13, 1999. In all other respects, we deny plaintiff's motion.

"Rule 59(e) allows a party to direct the district court's attention to newly discovered material evidence or a manifest error of law or fact, and enables the court to correct its own errors and thus avoid unnecessary appellate procedures." Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996). However, a party cannot use the rule "to undo its own procedural failures, [or] to introduce new evidence . . . that could and should have been presented to the district court prior to the judgment." Id.

In his motion, Benjamin makes many arguments which involve characterization of facts already before the Court. Of the nineteen facts which Benjamin asks that we reconsider, only one involved

an error in factual reporting in our Memorandum Opinion and Order. In section (o) of his motion, Benjamin points out that an event which we indicated occurred September, 8, 1991, actually occurred on September 9, 1991. Thus, we grant Benjamin's motion to the extent that the incident in question occurred on September 9, 1991, and amend the Opinion. The line will be amended to read "On September 9, 1991, Shealy called in and asked if Benjamin had appeared for work on time." The date of this event, however, has no effect on our overall holding.

In the other eighteen sections Benjamin's motion presents no evidence, new or old, which calls this Court's ruling into question. Benjamin's arguments are reiterations of those contained in his earlier briefs, and were all considered by this Court before we issued our memorandum Opinion and Order.

We grant in part Benjamin's motion to reconsider and amend page seven of our opinion to read "September 9, 1991," instead of "September 8, 1991". Because Benjamin's motion offers no newly discovered material evidence or any other errors of law or fact we deny his motion to reconsider in all other respects.

"s/ Wayne Andersen ".
Wayne R. Andersen
United States District Court

Dated: "s/January 13, 2000 ".

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROY W. BENJAMIN, Plaintiff,	)	
	)	Case No. 95 C 5077
v.	)	
	)	Judge Wayne R. Andersen
KATTEN, MUCHIN & ZAVIS, Defendant.	)	

MEMORANDUM OPINION AND ORDER

This case is before the Court on the Motion for Summary Judgment brought by Katten, Muchin & Zavis ("KMZ"). Pro se plaintiff Roy W. Benjamin has filed an eight Count Second Amended Complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Fair Labor Standards Act of 1938, 29 U.S.C. § 210 et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Defendant now moves for summary judgment on all counts. For the following reasons defendant's motion is granted.

PROCEDURAL HISTORY

On November 27, 1991, Benjamin filed a timely charge of gender and racial discrimination with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a right to sue letter on June 5, 1995.

On September 25, 1995, Benjamin filed a two-count complaint. In Count I Benjamin alleged that KMZ violated Title VII of the Civil Rights Act of 1964

by discharging him on the basis of his sex while retaining similarly situated female employees whose attendance records, work attitudes and work product were worse than his. In Count II Benjamin similarly alleged the defendant [page 2] discriminated against him in violation of Title VII by discharging him on the basis of his race while retaining similarly situated white employees.

On February 10, 1997, this Court granted Defendant's Motion for Partial Judgment on the pleadings to strike Benjamin's jury demand and prayer for compensatory and punitive damages. We found that the alleged conduct by defendant had occurred before the enactment of the Civil Rights Act of 1991, and that the new remedial provisions of the 1991 Act were unavailable to Benjamin. This Court gave Benjamin leave to amend his complaint with specificity and explain why allegations of discriminatory conduct after the enactment of 1991 Act were not included in Benjamin's EEOC charge.

On June 6, 1997, Benjamin filed his Amended Complaint, which added Counts III-XIV. On January 12, 1998, this Court granted in part and denied part defendant's 12(b)(6) Motion to Dismiss the Amended Complaint. This Court dismissed Counts III, IV, V, VI, IX, X, XII, and XIV. Count VII and VIII of the Amended Complaint alleged retaliation against Benjamin on the basis of race and gender in violation of § 704(a) of Title VII. This Court dismissed the claims based on the two instances of alleged retaliation which occurred before the filing of Benjamin's charge with the EEOC. However, this Court denied defendant's Motion to Dismiss with regard to Benjamin's allegation that defendant

retaliated after filing with the EEOC. Specifically, Benjamin alleged that defendant provided negative job references to prospective employers and fought his claim for unemployment insurance after he filed a charge with the EEOC.

On February 27, 1998, Benjamin filed the instant Second Amended Complaint. In Count I Benjamin alleges that defendant engaged in a pattern of discrimination in violation of Title VII of the Civil Rights Act of 1964, by hiring him into lower paying position on the basis of his [page 3] gender. Benjamin further alleges that his hiring and discharge were consistent with the policy of over concentrating African American males in the docket department, mail room and copy center. Furthermore, Benjamin alleges that he was discharged while KMZ retained similarly situated female employees with worse attendance records, work attitudes and work product. In Count II Benjamin similarly alleges that defendant engaged in a pattern of discrimination in violation of Title VII by hiring him into a lower paying position and discharging him on the basis of his race. In Count III Benjamin alleges that KMZ engaged in gender-based wage discrimination in violation of the Fair Labor Standards Act of 1938 by compensating similarly situated female employees with salaries that were above Benjamin's salary. In Count IV Benjamin alleges negligence for failure to provide an equal opportunity and reckless indifference to his federally protected rights. Benjamin alleges that defendant discriminated against Benjamin in violation of the Civil Rights Act of 1866 by failing to provide equal employment opportunity to Benjamin on the basis of race and gender. Furthermore, Benjamin alleges that he was discharged for exercising his rights to

challenge KMZ's employment practices. In Count V Benjamin alleges that he suffered disparate treatment under Title VII of the Civil Rights Act of 1964 because KMZ wrongfully discharged Benjamin for challenging KMZ's allegedly discriminatory practices. Benjamin also alleges that KMZ caused his unemployment insurance to be denied for seven months, and caused him to be unemployed for two years. In Count VI Benjamin alleges that defendant wrongfully discharged Benjamin in violation of Title VII of the Civil Rights Act of 1964, opposed his unemployment insurance, and caused him to be unemployed for two years. In Count VII Benjamin alleges retaliation under Title VII of the Civil Act of 1964, 42 U.S.C. § 2000e-3(a). In Count VIII Benjamin alleges retaliatory discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq.

FACTUAL BACKGROUND

[page 4]

Benjamin is an African-American male residing in Chicago, Illinois. KMZ is a large Chicago law firm. From July to October 1990 Benjamin worked for the defendant as a paralegal retained through a temporary placement agency. Benjamin met Edward Shealy, the manager of KMZ's docket department while temporarily working at KMZ. Shealy, an African-American man, expressed interest in permanently hiring Benjamin. Shealy recommended that KMZ hire Benjamin into the docket department. On October 8, 1990, the defendant hired Benjamin as a paralegal/docket clerk. Throughout Benjamin's employment tenure, Shealy was Benjamin's direct supervisor and responsible for supervising the entire docket department. When Benjamin was hired, the docket department had two other full time

employees. Karen Martin, an African-American woman, was hired in November 1986. Charles Koven, a white man, was hired in March 1987. Calvin Holmes, an African-American man was a part time employee who worked in the evenings.

Martin was assigned the tasks of directly supervising Benjamin and monitoring his progress within the department. Benjamin's duties included processing a daily calendar, generating attorney commitment forms, going to the courthouse to file or obtain documents or pleadings, reviewing the documents that he filed, entering documents into the department's computer system, and answering questions regarding court procedures. The docket clerks were required to prepare time sheets with descriptions of the work they performed. Benjamin's first three months at KMZ appear to have passed without incident.

On January 17, 1991, Shealy spoke with Benjamin about the amount of time it was taking him to complete projects. Although Shealy had previously allowed Benjamin to bill overtime in [page 5] order to finish his projects, he now indicated that he felt that Benjamin was taking too much overtime.

In January of 1991, all employees in the docked department except Benjamin were reviewed and received salary increases. On January 28, 1991, Benjamin approached Shealy to ascertain why he had not received a salary increase. Shealy agreed to raise the issue with John Villa, KMZ's director of personnel. On January 31 and February 25, 1991, Shealy sent memos to Villa inquiring about Benjamin's salary review.

In February of 1991 Martin expressed some misgivings about Benjamin's performance to Shealy. Martin said that Benjamin had a problem with teamwork. Specifically, she referenced Benjamin's desire to write strong notes to attorneys and secretaries when he felt they were wasting his time. After this conversation, Shealy compared Benjamin's time sheets to those of Martin and Koven. Shealy found that Benjamin used an hour or two more than Martin or Koven to prepare the daily calendar. On February 15, Shealy wrote a memo to Benjamin's file documenting concerns about his performance.

On March 11, 1991, Shealy told Benjamin that he had a $500 outstanding balance in petty cash that was not charged to any client numbers. Shealy informed Benjamin that he could be terminated if the outstanding balance was not addressed within a week.

Later in the same conversation Shealy told Benjamin he would be receiving a raise retroactive to January 1, 1991. The increase, however, did not meet Benjamin's expectations. Benjamin wanted an additional $5,000. He expressed his disappointment with the salary increase to Shealy and requested a meeting with the director of personnel. Shortly thereafter, Benjamin met with Villa to discuss his review and salary increase.

[page 6]

On May 21, 1991, Benjamin received a memorandum from the manager of the docket department concerning Benjamin's performance. The memorandum set forth certain conditions for Benjamin's continued employment with KMZ. Benjamin responded to the memorandum with a

Benjamin responded to the memorandum with a written rebuttal describing the criticisms as "an attack on his personality or an unwillingness or ambivalent acceptance of his personality type." Benjamin alleges that he was the only docket department employee to receive such scrutiny and that similarly situated white and female employees were not subject to such conditions of employment. Benjamin provides no evidence other than his affidavit and the conclusion that Koven and Martin were better treated even though their performance was not superior.

After May 12, 1991, Martin received a call from an attorney's secretary complaining that she had not received a copy of a pleading filed the previous day. Martin looked for the pleading and found it on Benjamin's desk.

In June of 1991, a docket department meeting was held in which it was decided that Benjamin's desk would be moved physically into the actual docket department. Prior to that time Benjamin's desk was located outside the department. Other issues discussed included more extensive training for Benjamin in the areas of troubleshooting questions, telephone answering, and running docket reports.

On July 15, 1991, Shealy called Benjamin into his office to discuss Benjamin's "constant tardiness." Before July 15, Benjamin was late three or four times over a period of two to three weeks. Shealy explicitly warned Benjamin that , if he was late one more time during the next 30 days, he would be forced to undergo an exit interview. Benjamin alleges that other employees had more absences, but that Benjamin was the only employee whose employment

was contingent upon [page 7] his attendance record. Benjamin's evidence for this claim is that Koven had several absences from work, but he fails to identify other KMZ employees who were tardy during the relevant period.

At the same meeting, Shealy directed Benjamin to stop working through lunch for overtime. Although Benjamin agreed to this request, he worked through lunch on August 6, August 23, August 27, September 3, September 9, September 10, September 11, September 16 and September 17, 1991. Benjamin does not dispute that he worked through lunch, but he does allege that, when he first arrived, Shealy told him to work as long as it took to finish a project. Furthermore, Benjamin notes that everyone in the docket department was given the project of organizing the court forms, and only he was able to finish the project.

On September 8, 1991, Shealy called in and asked if Benjamin had appeared for work on time. Martin indicated that she did not see him until about 9:20 a.m. that morning. Benjamin alleges that he was on time that day. Shealy prepared a memo regarding the perceiving tardiness in which he noted that Benjamin had arrived at work on time.

On September 20, 1991, Benjamin and Koven had an altercation involving Koven storing some papers and books above Benjamin'' desk. After the incident, Koven arranged a lunch meeting on September 23, 1991, with Shealy and Martin to discuss Benjamin. At the meeting Koven expressed concern and frustration with Benjamin's work attitude, work product, and unwillingness to

cooperate with department policies. Furthermore, Koven cited a laundry list of professional and personal problems which Benjamin had encountered during his tenure at KMZ.

In response to this meeting, Shealy recommended to Villa that Benjamin be discharged. On September 25, 1991, Benjamin participated in an exit interview with Villa. During the interview, the director informed Benjamin that his employment was terminated effective immediately. [page 8] Benjamin then requested a transfer to a paralegal position. The director responded that Benjamin's employment was terminated "with no rehire status." The director also read the memoranda from Benjamin's personnel file which detailed the reasons for his discharge including constant tardiness, poor work attitude, deficient work product, and an unwillingness to cooperate with department policy and procedures. Benjamin responded that the information in the memoranda consisted of "nothing but lies and fabrication."

A dispute exists about the individual hired to replace Benjamin. Defendant contends that they hired Kurt Broyles, an African American man, to replace Benjamin. Benjamin contends that Janet Venable, a white female, was hired in his position.

Benjamin alleges that similarly situated white and female employees were treated differently without any nondiscriminatory reason. Benjamin's only evidence for this claim is to compare his situation to Koven and Martin. Since they were paid more and not terminated, Benjamin concludes that race and gender discrimination must be a factor. Benjamin further alleges that the reasons for his

discharge were pretextual for intentional discrimination on the basis of his gender and race. Benjamin has no evidence of this claim other than his affidavit in which he indicates that he believes that discrimination played a part in his discharge. Additionally, Benjamin alleges that prior to his termination on September 25, 1991, he satisfactorily performed all of the duties and responsibilities of his position.

After Benjamin was terminated, he attempted to look for another position as a paralegal. Benjamin alleges that KMZ provided negative job references to prospective employers, although he only specifically identifies two employers who allegedly spoke to KMZ. One potential employer, Michael Evers of the Wallace Registry, Inc., had scheduled an appointment with Benjamin. [page 9] Benjamin alleges that after Evers spoke with someone from KMZ, he call back to cancel the appointment with Benjamin. The second instance involved an interview that Benjamin has provided no admissible evidence to support. Benjamin was unable to remember who interviewed him, when he interviewed, or for what position he interviewed. However, he alleges that the individual interviewing him told him he had spoken to someone at KMZ. Benjamin stated that the individual would not reveal the substance of the reference, but Benjamin was not offered a position. Since the second incident would be inadmissible, we cannot consider it here.

Benjamin was subsequently unemployed for a two-year period. In October of 1991 KMZ opposed Benjamin's unemployment compensation claim, and

appealed the decision of the Board of Review which was in favor of Benjamin.

After extensive discovery of this issue, the only evidence that Benjamin can marshal in support of his allegations is conclusory statements in his affidavit about motives and events during his tenure as an employee of Katten, Muchin & Zavis. Benjamin has no other evidence that discrimination occurred other than the unsupported assertions in his own affidavit. In his affidavit he describes his belief that improper motivations led to his termination. KMZ, on the other hand, rebuts his characterizations with evidence supporting its motivations. With these facts in mind we turn to the legal issues.

DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ P. 56(c). The party seeking summary judgment carries the initial burden of demonstrating an [page 10] absence of evidence to support the position of the nonmoving party. Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 443 (7th Cir. 1994). The nonmoving party must then set forth specific facts showing that there is a genuine issue of material fact and that the moving party is not entitled to judgment as a matter of law. Anderson v. Liberty Lobby, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). A genuine dispute about a material fact exists only if the evidence is such that a reasonable jury could return a verdict for the

nonmoving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

In making this determination, the Court must draw every reasonable inference from the record in the light most favorable to the nonmoving party and should not make credibility determinations or weigh evidence. Association Milk Producers, Inc. v. Meadow Gold Dairies, Inc., 27 F.3d268, 270 (7th Cir. 1994). The nonmoving party must support its contentions with admissible evidence and may not rest upon the mere allegations in the pleadings or conclusory statements in affidavits. Celotex, 477 U.s. at 324. The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to its case an on which that party will bear the burden of proof at trial. The production of only a scintilla of evidence will not suffice to oppose a motion for summary judgment. Anderson, 477 U.S. at 252. Employment discrimination cases, while often turning on factual questions, are nonetheless amenable to summary judgment when there is no genuine dispute of material fact or there is insufficient evidence to demonstrate the presence of the alleged motive to discriminate. Cliff v. Board of School Comm'rs, 42 F.3d 403, 409 (7th Cir. 1994). With these standards in mind, we turn to the motion before us.

[page 11] Since each Count in Benjamin's Second Amended Complaint alleges a variety of violation we will address plaintiff's allegations by issue rather than Count. In Counts I, II, V, VI, VII, VII Benjamin alleges violation of Title VII. In portions of Counts I, II, V, and VII Benjamin alleges hiring

the paralegals at KMZ. KMZ argued that only information on employees in the docketing discrimination and disparate wage treatment in violation of Title VII. In portions of Counts V, VI, VII and VIII Benjamin alleges post-termination retaliation claims in violations of Title VII. In Count III Benjamin alleges a violation of the Fair labor Standards Act. Finally, in Count IV Benjamin alleges a violation of section 1981.

I. Title VII Claims

A. Hiring Discrimination Claims

Benjamin alleges that KMZ makes a practice of placing all of its African-American male employees in lower paying position, such as the docket department. Therefore, Benjamin is alleging that defendant is treating African American men differently than similarly situated whites or women in violation of the VII. First, he may present direct evidence that he was the victim of discrimination. Oates v. discovery Zone, 116 F.3d 1161, 1169 (7th Cir. 1997). Because Benjamin offers no direct evidence of racial discrimination, he used the indirect method established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Under the McDonnell Douglas indirect method Benjamin must first establish a prima facie case by demonstrating: 1) that he belonged to a protected class; 2) that he applied for and was qualified for a particular position; 3) that he was not offered the position; and 4) that the position remained open to others after he was rejected. Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 515 (7th Cir. 1996).

[page 12] Defendant does not dispute that Benjamin belongs to a protected class, that he applied

for and was qualified for a paralegal position, and that he was not offered a paralegal position. Thus, Benjamin satisfies the first three prongs of the prima facie test. The fourth prong, however is a problematic. KMZ contends that Benjamin cannot prove that defendant was seeking applicants for a paralegal position or that they continued to take applications from individuals with his qualifications. If no vacancy exists, generally there can be no Title VII discrimination claim. Rush v. McDonald's Corp., 966 F.2d 1104, 1118, (7th Cir. 1992). Since Benjamin admits that he cannot prove that KMZ was seeking applicants, he cannot establish a prima facie case of discrimination.

Benjamin also alleges that defendants were engaged in a "pattern and practice" of discriminatorily placing minority employees in lower paid positions in the docket department, mail room and copy center. "A pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine or of a generalized nature. Teamsters v. United States, 431 U.S. 324, 336-37, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)(Quoting the statement of Senator Humphrey, 110 Cong. Rec. 14270 (1964)). Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimination. Teamster, 431 U.S. at 336. The only evidence that Benjamin can produce in support of his argument is his own affidavit's conclusion that defendant has treated him in a discriminatory manner by hiring him in a lower paying position than he deserved. Benjamin has provided no proof, either statistical or anecdotal, that defendants have a policy

of discrimination against African-Americans or males. The mere allegation of discriminatory [page 13] intent is not sufficient here to overcome intent is not sufficient here to overcome summary judgment, the plaintiff must prove by a preponderance of evidence that the defendant engaged in discrimination.

D. Termination Retaliation Claims

Benjamin alleges that the defendant retaliated against him because he opposed race and gender discrimination. Benjamin does not attempt to explain how his allegations meet the prima facie test for retaliation under Title VII. An employee must establish a prima facie case of retaliation by showing that: 1) he engaged in statutorily protected expression; 2) he suffered an adverse employment action; and 3) there is a casual link between the protected expression and the adverse action. Talanda v. KFC Nat'l Mgmt. Co., 140 F.3d 1090, 1095 (7th Cir. 1998). It is difficult to determine what statutorily protected expression Benjamin alleges. Benjamin did go to Villa in an attempt to secure a review and pay raise, but there is no evidence that Benjamin made race a factor in the discussion. In fact, in his deposition Benjamin specifically was asked whether he had attributed defendant's failure to review him and give him a raise to race and gender discrimination. In response, Benjamin indicated: "No, I didn't. I didn't say that to him because at the time ... I hadn't really thought about it." (Deposition of Roy W. Benjamin p. 316). Benjamin did not file an EEOC charge until two months after defendant terminated his employment. Thus, there is no possible inference that KMZ knew of a race or gender claim. Therefore, even if KMZ discharged Benjamin

for complaining about his raise he has no Title VII claim because KMZ had no discriminatory motivation. Although Benjamin can prove the second prong, that he suffered an adverse employment action, he cannot show that he engaged in statutorily protected expression or that there was causal link between his expression and termination.

[page 14] Even under the more generic formulation of a Title VII claim, Benjamin cannot withstand summary judgment. He cannot establish a prima facie case and has failed to show that defendant's reasons are pretextual. To show a general case of discrimination in termination under the McDonnell Douglas burden shifting method, a plaintiff must show that: 1) he is a member of a protected group; 2) he was performing his job at a level that met the employer's legitimate performance expectations; 3) he was fired: and 4) another, similarly situated but not in the protected class, was treated more favorably. Plair v. E.J. Branch[sic] & Sons, Inc., 105 F.3d 343, 347 (7th Cir. 1997); Stalter v. Wal-Mart Stores, Inc., ___F.3d___(7th Cir. 1999)(No. 98-3453). There is no dispute about two of the four prongs. Benjamin is a member of a protected group, and he was fired. Benjamin, however, cannot overcome his burden on either the second or fourth prongs of the prima facie test.

Benjamin contends that he was performing satisfactorily, but self serving statements by plaintiffs in employment discrimination cases are not sufficient to establish that fact. Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992) ("An employee's self serving statements about his ability ... are insufficient to contradict an employer's

negative assessment of that ability"); Williams v. Williams Elec., Inc., 856 F.2d 920, 924 (7th Cir. 1988) (employee's self-interested assessment of her own job abilities are insufficient to raise an issue of fact). Defendant sets out a long list of problems with Benjamin's job performance. Those problems include the length of entries on his time sheets, taking too much overtime, concerns with inefficiency, Benjamin's problem with petty cash, the amount of time Benjamin took to do the daily calendar, Benjamin's failure to return file stamped pleadings to attorneys, and repeated tardiness for work. Shealy warned Benjamin about his problems, and he did not believe that Benjamin had [page 15] rectified the situation. To defeat summary judgment, Benjamin must do more than cast doubt on some of defendant's proffered reasons for the dismissal. It is Benjamin's burden to show that he has satisfied his employer's legitimate expectations, and evidence that defendant was not satisfied requires a dismissal of the Title VII claim. Villa v. City of Chicago, 924 F.2d 629, 631 (7th Cir. 1991)

Once the employer offers performance deficiencies, those deficiencies can defeat the second element of the prima facie case and also represent the employer's legitimate justification for its employment decision. Fuka v. Thompson Consumer Elecs., 82 F.3d 1397, 1404 (7th Cir. 1996); Adreani v. first Colonial Bankshares Corp., 154 F.3d 389, 394 (7th Cir. 1998). Thus, we can analyze the second element of the prima facie test together with our analysis of pretext. Adreani, 154 F.3d at 394-395.

When the employer produces evidence of a nondiscriminatory reason for its action, the employee

must demonstrate that the employer's proffered reason for its decision was not actual reason and that is was only a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993). Pretext means more than mistake. In Title VII suits in order to show a pretext plaintiff must show an intentional lie. Russell v. ACME-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995). If the company provides a valid uncontroverted reason for the discharge, even if some stated reasons are shown to be untrue, the case cannot withstand summary judgment. Id. at 69; Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1012 97th Cir. 1994).

In this case, defendant has submitted a number of reasons for terminating Benjamin's employment. The denial language in Benjamin' 12(N) statement (New Local Rule 56.1.(b)(3)(B)) [page 16] is not sufficient to create an issue of material fact without reference to a fact which will contest the claim. Local Rule 12(N) provides: "All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party. N. Dist. Ill. Local R. 12(N). In the case of disagreement, Rule12(N) require the nonmoving party to provide "specific references to the affidavits, parts of the record," and any other materials that support the nonmoving party's factual disagreement. Thus, a naked denial of a fact set forth in the Rule 12(M) statement is insufficient and will operate as an admission that the fact is accurate. The unambiguous language of the rule indicates that compliance is not discretionary and, therefore, the Seventh Circuit has "repeatedly upheld the strict enforcement" of its provisions. Waldridge v.

American Hoechst Corp., 24 F.3d 918, 921-22 (7th Cir. 1994) (and cases cited therein).

Benjamin admits that he received a memo written on May 21, 1991 which described many shortcomings in his professional behavior. Benjamin was "on notice" of: his constant tardiness; spending too much time on food breaks in the morning; taking too long to complete the mail; inability or unwillingness to answer questions on the telephone; disappearing for large portions of the day; claiming to take lunch breaks, but disappearing for an hour at lunch time; leaving late for court; taking too long to file documents at court; overly long time entries; rude behavior in the workplace; and consistently leaving assignments incomplete.

Benjamin was put on a 30 day probation for tardiness on July 15, 1991 and warned that he would be terminated if late again. Furthermore, Benjamin was told to stop working through lunch for overtime. Although Benjamin makes a blanket denial of the fact that he subsequently worked through lunch, his answer merely notes that Shealy approved his time sheets. Benjamin's affidavit, which he references to refute these arguments, contain no denial of the fact that he disregarded [page 17] Shealy's directive to stop working through lunch. Benjamin disregarded this admonition and worked through lunch eleven times between July 29 and September 17, 1991.

The question here is whether the employer honestly based its employment decision on performance related considerations, not whether the employer's decision was correct. Day[sic] v. Colt Construction & Development Co., 28 F.3d 1446, 1460

(7th Cir. 1994); Kralman v. Illinois Dep't of Veterans' Affairs, 23 F,3d 150, 156-57 (7th Cir. 1994). Shealy was under the impression that Benjamin was often late to work, unnecessarily billed overtime, and acted as a disruptive influence in the department. Shealy's rationale establishes a nondiscriminatory reason for the termination, which Benjamin must rebut with evidence of pretext.

Benjamin must show that Shealy or Villa knew that these reasons were lies, or did not really believe the problems to be serious enough to fire him. Plaintiff argues that Koven had similar performance problems, including seven unscheduled absences from work. Villa, in his deposition, observed that individuals were taken at their word regarding sick days, and if people cannot come into work they are given the benefit of the doubt. It seems rational to differentiate between individuals who are ill and cannot come to work and those who, for whatever reason, are tardy to work. Illness is not within the control of the individual, but in general, tardiness is within the control of the individual.

Benjamin provides no evidence that Shealy or Villa thought their justifications to be a lie. Furthermore, Benjamin's position is undermined by the fact that his case involves a "common actor" situation. Benjamin was hired and fired by Shealy, an African American male, who made the determination that plaintiff was not adequately performing his duties. The common actor presumption exists when an employee is a protected class "is hired and fired by the same [page18] decision-maker in a relatively short time span." Chiaramonte v. Fashion Bed Group, 129 F.3d 391, 399 (7th Cir. 1997). A presumption of non

discrimination arises from the facts of this case. Chiaramonte, 129 F.3d at 399. In Chiaramonte, the decision-maker hired the plaintiff when he was 52 years old, retained him after a merger, and two years later fired him. Holding that the common actor presumption applied, the court noted, "[i]t is highly doubtful that a person who hires an employee in the protected age group ... would fire that same employee ... as a result of a sudden 'aversion to older people.' " Id. (quoting Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 175 (8th Cir. 1992)). Benjamin was hired as an African American male, and it is unlikely that Shealy would suddenly develop an aversion to African American men. Because we believe that defendant has articulated a legitimate nondiscriminatory reason for the decision to terminate Benjamin and because Benjamin has failed to show that the reasons were pretexts for discrimination, summary judgment is appropriate.

D. Post-Termination Retaliation Claims

Benjamin alleges that KMZ retaliated against him on the basis of race and gender by depriving him of his right to unemployment insurance and employment through misrepresentations to the Illinois Department of Employment Security and by providing negative references to potential employers. As we noted in our January 12, 1998 Memorandum Opinion and Order, 1998 WL 25757, Benjamin's claims regarding unemployment insurance are barred because he did not raise them before the EEOC. Benjamin's EEOC filing was on November 27, 1991. Benjamin alleges that KMZ opposed unemployment insurance in October of 1991. Since this claim should have been included in the plaintiff's EEOC charge, it

cannot serve as a basis for a retaliation claim. [page19] Furthermore, Benjamin admitted that KMZ opposed the unemployment claim based on its view that Benjamin had committed misconduct connected with his work. (Plaintiff's Amended Local Rule 12(N)3(a) Response ¶ 86).

As we noted in the January 12, 1998 opinion, however, the claims regarding negative references to prospective employers are not barred because Benjamin did not necessarily know about them at the time of his filing of the EEOC charge. However, Benjamin has failed to provide any admissible evidence of KMZ employees giving negative references. The two specific allegations that individuals did not hire Benjamin, without more, do not approach a preponderance of evidence. Benjamin must show more than his conjecture that KMZ employees offered negative references in order to meet his burden. Since Benjamin has failed to provide admissible evidence supporting this claim, summary judgment is appropriate.

III. Fair Labor Standards Act Claim

Benjamin has alleged discrimination under the Fair Labor Standards Act because defendant compensated similarly situated female employees with salaries that were higher for jobs that involved the same amount of work. To establish a prima facie case under the Equal Pay Act, a Plaintiff must show: 1) that different wages are paid to employees of the opposite sex; 2) that the employees do equal work which requires equal skill, effort, and responsibility; and 3) that the employees have similar working conditions. Corning Glass Works v. Brennan, 417 U.S.

188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974); Epstein v. Secretary, United States Department of the Treasury, 739 F.2d 274, 277 (7th Cir. 1984). Once a prima facie case has been established, defendant has the burden to show that the disparity of pay is due to one of the four defenses set forth [page 20] in the statute. Fallon v. State of Illinois, 882 F.2d 1206, 1213 (7th Cir. 1989). To actually succeed, a plaintiff "must establish, based upon 'actual job performance and content-not job titles, classifications or descriptions that the work performed ... is substantially equal."' EEOC v. Mercy Hospital and Medical Center, 709 F.2d 1195, 1197 (7th Cir. 1983)(quoting Gunther Gunther v. County of Washington, 623 F.2d 1303, 1309 (9th Cir. 1979), aff'd, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981)).

The key to determining whether equal work is performed is whether the jobs have a common core of tasks. Fallon, 882 F.2d at 1209. Benjamin compares his salary to that of Karen Martin to establish KMZ's practice of favoring female employees over male employees. Using Martin, Benjamin cannot even establish the prima facie case for a violation of the Fair Labor Standards Act. Benjamin admits that Martin was responsible for the docket department in Shealy's absence, and Martin was also assigned the task to training Benjamin and monitoring his progress in the department. Thus, Martin shared all of Benjamin's responsibilities but had substantial other responsibilities in the department.

Furthermore, even if Benjamin were able to articulate a prima facie case, KMZ qualifies for one of the four defenses in the statute. If a party establishes a prima facie case the burden of proof shifts to the

employer to show that the pay disparity is due to: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; or 4) any other factor other than sex. 29 U.S.C. § 206(d)(1)(i)-(iv). Defendant contends that the pay differential was based on time spent working at KMZ, and familiarity with defendant's policies. Martin had been [page 21] an employee at KMZ since November 1986. Four years of extra experience is sufficient justification for greater pay. Furthermore, Koven's salary was higher than either Martin's or Benjamin's. Thus it is clear that defendant does not have a policy discriminating against men in favor of women.

III. Section 1981 Claims

In Count IV Benjamin alleges that defendant discriminated in violation of section 1981 on the basis of race and gender. Defendant contends that Benjamin's section 1981 claims are barred by the statute of limitations. Section 1981 has a two-year statute of limitations period. Smith v. City of Chicago Heights, 951 F.2d 834, 839 (7th Cir. 1992). Although Benjamin first raised the possibility of a violation of section 1981 in his Amended Complaint, we do not have to determine whether that charge relates back to the filing of the original Complaint. Even if his charge related back to the original Complaint, it would still be barred by the statute of limitations because almost four years had passed since the last allegedly discriminatory act. Benjamin contends that he was the victim of a continuing violation, and that as such, defendant's actions fall within the statute of limitations. In order to use the continuing violation theory, a discrete act of discrimination must occur

within the limitations period. Sela v. Kiley, 969 F.2d 560, 564 (7th Cir. 1992). Since Benjamin has alleged no acts of discrimination between September 25, 1993 and September 25, 1995, his claims are barred by the statute of limitations.
[page 22]

CONCLUSION

For all the reasons stated above, the Court grants Katten, Muchin & Zavis' Motion for Summary Judgment. Judgment is entered on Counts I, II, III, IV, V, VI, VII, and VIII. This case is terminated.

It is so ordered.

"s/Wayne Andersen"
Wayne R. Andersen
United States District Judge

Dated: "s/December 13, 1999"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROY W. BENJAMIN, Plaintiff,	)	Case No. 95 C 5077
v.	)	Judge Wayne R. Andersen
KATTEN, MUCHIN & ZAVIS, Defendant.	)	Magistrate Judge Bobrick

ORDER

This matter coming to be heard on Plaintiff's Motion To Compel Answers to Interrogatories and Production of Documents before Magistrate Judge Edward A. Bobrick on January 15, 1997, Defendant appearing by counsel and Plaintiff appearing *pro se*, and the Court being fully advised in the premises, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion to compel is granted in part and denied in part, and Defendant's objections to Plaintiff's interrogatories and requests for production are sustained. Plaintiff's motion is granted as follows:

   a. Defendant shall supplement its response to Interrogatory No. 1 by specifying as to which interrogatories the identified persons assisted, supplied information or were consulted;
   b. Defendant shall supplement its response to Interrogatory No. 2 by identifying the specific violations committed by Plaintiff which led to his [page 2] termination and the appropriate section

or sections of Defendant's policy manual which correspond to the alleged violations, if any;

c. Defendant shall supplement its response to Interrogatory 13 by specifying the appropriate sections of Defendant's policy manual with correspond to its response, if any;

d. Defendant, if its Motion for Partial Judgment on the Pleadings is denied, shall provide a response to Plaintiff's Document Request No. 3 no later than one week prior to the commencement of trial in this matter.

2. Plaintiff's motion to compel responses for the time period other than January 1, 1990 to December 31, 1991 is denied. Defendant may limit its responses to Plaintiff's interrogatories and requests for production of documents to that time period, except that Defendant shall produce all applications for the position of Docket Clerk for the time period January 1, 1989 to December 31, 1991.

3. Plaintiff's motion to compel responses for persons other than Docket Clerks employed by Defendant during the relevant time period as set forth above is denied. Defendant, however, shall produce all personnel documents in its custody, possession or control regarding those persons.

4. When identifying persons in response to Plaintiff's interrogatories, Defendant shall provide the race, sex, and telephone number for all such persons. For persons identified as Docket Clerks during the years 1990 and 1991 who no longer are employed by Defendant, Defendant shall provide their last known address and telephone number. To the extent not [page 3] already provided, Defendant shall produce

produce pay rates and pay increases, including bonuses, for all Docket Clerks it employed between January 1, 1990 and December 31, 1991.

ENTERED: "s/February 10," 1997

"s/Edward A. Bobrick"
Hon. Edward A. Bobrick
United States Magistrate Judge